In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 578

ANTONIO CORALLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, together with others, was convicted by a jury in the United States District Court for the Southern District of New York of conspiracy to violate the Travel Act, 18 U.S.C. 1952, by using the facilities of interstate commerce to commit bribery. He was sentenced to three years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed in a lengthy opinion (Pet. App. 1a–56a).[1]

Although petitioner seeks to raise the question whether an undercover agent (allegedly co-defendant Itkin), instructed to infiltrate a conspiracy, can be treated as a co-conspirator at the trial for purposes of admission of statements against all members of the

[1] The facts are comprehensively detailed in Judge Medina's opinion for the court of appeals (See Pet. App. 6a–28a).

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conspiracy (see *United States* v. *Chase*, 372 F. 2d 453, 459–460 (C.A. 4), certiorari denied, 387 U.S. 907), that question is not squarely presented by this record. Petitioner asserts that Itkin, who had agreed to provide information about organized crime activities to the F.B.I., did not participate in the instant conspiracy as an actual member thereof but rather in his capacity as an informant. But the factual issue whether Itkin was acting for himself or for the government in the present case was resolved against petitioner both by the trial judge and by the court below on appeal (See Pet. App. 31a–35a; *id.* at 35a n. 2).

The record—which shows, *inter alia*, that Itkin never reported anything about the conspiracy to the F.B.I. until after the last payment had been received and the matter was under investigation by the State—fully supports the conclusion that Itkin was not acting as an agent in regard to the criminal conspiracy in this case (Tr. 994–998, 1377–1389).[2] There is, in these circumstances, no occasion for this Court to review the factual findings of the court below.[3]

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[2] In quoting from the government's brief in the court of appeals that Itkin had been "an F.B.I. informant for years" (Pet. 8), petitioner fails to quote the full context in which this statement appears. That context plainly indicates that the government's position below was that Itkin had a personal stake in the illegal venture charged in this case (see government's brief in the court of appeals, p. 43).

[3] We also note that to the extent that petitioner's complaint rests on hearsay principles, it is thoroughly undermined by the fact that Itkin testified at trial and was subject to extensive cross-examination (consuming more than 400 pages of the transcript) concerning any of his extra-judicial statements that had been offered in evidence. See *United States* v. *Brill*, 350 F. 2d 171, 173 (C.A. 2), certiorari denied, 382 U.S. 973.

Petitioner's other contentions, which pertain to the instructions, are insubstantial and are fully answered in the thorough opinion of the court below, on which we rely (see Pet. App. 36a–39a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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